

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Petition of the Verizon Telephone  
Companies for Declaratory Ruling, or,  
Alternatively, for Interim Waiver with  
Regard to Broadband Services Provided  
via Fiber to the Premises

Conditional Petition of the Verizon  
Telephone Companies for Forbearance Under  
47 U.S.C. § 160(c) with Regard to Broadband  
Services Provided via Fiber to the Premises

WC Docket No. 04-242

**CONSOLIDATED REPLY OF VERIZON TO  
OPPOSITIONS TO AND COMMENTS ON PETITIONS WITH RESPECT TO  
BROADBAND SERVICES PROVIDED VIA FIBER TO THE PREMISES**

Edward Shakin  
Julie Chen Clocker  
VERIZON  
1515 North Court House Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3071

Michael E. Glover  
*Of counsel*

J.C. Rozendaal  
KELLOGG, HUBER, HANSEN,  
TODD & EVANS, P.L.L.C.  
Sumner Square  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036-3209  
(202) 326-7900

August 2, 2004

## TABLE OF CONTENTS

Introduction and Summary .....	1
Discussion .....	5
I.    Many Commenters Agree that Interim, Targeted Relief for FTTP Would Benefit Consumers and the Public Interest.....	5
II.   The Petitions Seek Interim Relief Narrowly Tailored to Verizon’s New FTTP Broadband Services.....	8
III.  The Commission Should Confirm that the Waivers and Determinations in the <i>Cable Modem Declaratory Ruling</i> Apply to FTTP Broadband Transmission .....	10
IV.   Granting an Interim Waiver Is Appropriate and Consistent with Commission Precedent.....	14
V.    Alternatively, the Requirements for Forbearance Pending Completion of the Ongoing Rulemakings Are Satisfied .....	17
A. The Commission Has Already Tentatively Concluded that the Conditions for Forbearance Exist .....	17
B. No Market Power or Other Justification Exists for Common- Carrier Regulation of FTTP Broadband Service .....	18
C. The Requested Interim Relief Cannot Harm Competition .....	23
Conclusion .....	27
Exhibit A – <i>Broadband Competition: Recent Developments</i> (March 2004)	
Exhibit B – Memorandum of Understanding between Verizon and the United States Internet Industry Association (June 25, 2002).	
Exhibit C – List of the Verizon telephone companies	

**CONSOLIDATED REPLY OF VERIZON TO  
OPPOSITIONS TO AND COMMENTS ON PETITIONS WITH RESPECT TO  
BROADBAND SERVICES PROVIDED VIA FIBER TO THE PREMISES<sup>1</sup>**

**Introduction and Summary**

Verizon has filed two petitions seeking narrowly tailored *interim* relief for broadband service provided via fiber to the premises (“FTTP”) so that it can compete on a level regulatory playing field with incumbent cable companies and other fiber overbuilders until the Commission completes its ongoing review of what regulations, if any, should apply to broadband services. Many commenters support Verizon’s petitions as a sensible short-term means of increasing broadband competition and reducing regulatory impediments to investment in and deployment of next-generation broadband infrastructure. The few parties who oppose the petitions for the most part resort to wild mischaracterizations of the petitions and argue about issues that are not actually before the Commission in this proceeding. But the simple fact is that in its petition here, Verizon is seeking targeted, interim regulatory relief for its FTTP broadband service. That is all.

Verizon had announced the location of its first FTTP deployment in Keller, Texas, before filing its petitions in this proceeding. In the short time that has elapsed since then, Verizon has already announced two more FTTP deployments in and around Huntington Beach, California, and Tampa, Florida. Verizon is thus well on its way to meeting its goal of offering FTTP in parts of nine states, passing one million homes, by the end of this year. Corning correctly notes that “Verizon’s 1-million home deployment will increase the total U.S. figure [for homes passed by FTTP] 500% in one year alone.”<sup>2</sup> The package of services, including video services and very-high-speed Internet access to be offered over FTTP, will bring added competition to the

---

<sup>1</sup> The Verizon telephone companies (“Verizon”) are the local exchange carriers affiliated with Verizon Communications Inc., which are identified in Exhibit C hereto.

<sup>2</sup> Corning Comments at 4.

broadband market, with improved speeds at attractive price points, and ultimately to cable's core video market as well.

A number of commenters – both those supporting the petitions and those opposing them – suggest that it would be preferable for the Commission to complete its pending broadband proceedings and establish clear rules for broadband services generally.<sup>3</sup> Verizon, too, hoped and anticipated that the Commission would have established an appropriate regulatory framework for broadband services before Verizon began offering FTTP broadband service to its customers.<sup>4</sup> But it is now apparent those proceedings will not be completed in time for the initial FTTP deployments, and it is critical to know what rules will apply to the services offered over this next-generation infrastructure.

The Commission has never specifically addressed the regulatory status of broadband services in the context of the FTTP architecture at issue here, but it *has* addressed the rules governing broadband services offered by cable companies together with voice and/or video services over their networks. In its *Cable Modem Declaratory Ruling*,<sup>5</sup> the Commission on its

---

<sup>3</sup> NJ Ratepayer Advocate Opposition at 4; SBC Comments at 2; Sprint Opposition at 2-3.

<sup>4</sup> Indeed, Verizon had good reason to hope that the broadband proceedings would be concluded as early as the end of 2002. See, e.g., Kathleen Q. Abernathy, Commissioner, FCC, *The Importance of Federal-State Collaboration in Telecommunications Regulation*, Remarks at the Conference of California Public Utility Counsel, Napa Valley, CA (Oct. 1, 2002) (“We are continuing to review the record in the Wireline Broadband proceeding, and I hope we are able to reach a decision on the classification issue by the end of the year.”); Telecommunications Industry Ass’n, *TIA’s Industry Beat Bulletin*, Sept. 19, 2002, available at [https://www.tiaonline.org/media/beat/mobile\\_brandnew.cfm?ID=45#1](https://www.tiaonline.org/media/beat/mobile_brandnew.cfm?ID=45#1) (“Commissioner Kevin J. Martin stated that the agency needs to act quickly to resolve its outstanding broadband proceedings and that he is committed to trying to accomplish this by year end.”).

<sup>5</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”), vacated in part, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

own motion waived the rules that might otherwise require cable companies to unbundle the transmission component of their information services and offer it on a stand-alone basis under tariff at cost-based rates. In addition, the Commission determined that if cable companies offer broadband transmission to ISPs, they may do so on an individual-case basis rather than a common-carriage basis. The Commission should clarify that these two key determinations apply equally to Verizon's FTTP broadband service – at least until the Commission establishes an appropriate regulatory framework for broadband in general. Or, if necessary, the Commission should invoke its powers of waiver or forbearance in order to create an interim regulatory environment for FTTP broadband service that parallels the current environment for cable modem service.

The Commission should reject the specious procedural objections raised by a few commenters. For instance, Verizon is not seeking to repeal any Commission rules under the guise of a declaratory ruling. Instead, Verizon seeks confirmation that its FTTP broadband offerings fall within the scope of existing waivers already granted by the Commission – an entirely proper subject for declaratory action.

Nor does the Ninth Circuit's *Brand X* decision<sup>6</sup> pose any obstacle to the requested interim relief. The court in that case did not disturb the Commission's decision to waive the application of key requirements imposed under Title II, nor did it disturb the Commission's conclusion that cable companies may provide service to ISPs or other content providers on a private carriage basis. And all commenters agree that it is within the Commission's power to refrain from common-carrier regulation of cable modem service even if *Brand X* is ultimately upheld. (Indeed, some commenters even argue, wrongly, that FTTP broadband transmission should be

---

<sup>6</sup> *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

offered under tariff precisely *because* cable modem operators will have the freedom not to offer broadband transmission in that way.) The Commission can do the same for FTTP broadband services.

To the extent that forbearance from Title II requirements is needed in order to provide the requested interim relief, the present market situation in broadband clearly meets the forbearance standards that the Commission has previously established. The Commission's tentative conclusion in the *Cable Modem Declaratory Ruling* that forbearance from Title II regulation of cable modem service would be in the public interest was amply justified at the time, and the evidence favoring forbearance from Title II regulation of broadband service has mounted steadily since then, with increased broadband deployment by a variety of providers.

A party can become subject to common-carrier regulation *either* voluntarily, by holding itself out to serve indifferently all members of the public, *or* involuntarily, where the Commission determines that common-carrier regulation is needed in order to prevent the abuse of a carrier's perceived monopoly power. Verizon has made it clear that it wishes to negotiate individual terms and conditions with its FTTP broadband transmission customers (just as cable modem providers do) rather than undertaking to serve all of them indifferently, so the *only* justification for imposing common-carrier regulation would be a finding that Verizon somehow has market power with respect to FTTP broadband – a finding that the record utterly fails to support.

The Commission repeatedly has found that the broadband market is developing on a competitive basis and the preconditions for monopoly are absent. Verizon has no market power even when all of its broadband transmission services are taken into account, let alone when the minuscule fraction attributable to FTTP broadband is considered. In any event, Verizon has

made it clear that it intends to continue to enter into commercial agreements on mutually agreeable negotiated terms with unaffiliated ISPs if the requested interim relief is granted. In short, the facts do not support the proposition that the requested interim relief will prevent ISPs from reaching their customers. Quite the contrary: by granting the requested interim relief, the Commission would further its stated objectives of encouraging broadband deployment and eliminating irrational regulatory disparities, without prejudging the outcome of the pending broadband dockets.

### **Discussion**

#### **I. Many Commenters Agree that Interim, Targeted Relief for FTTP Would Benefit Consumers and the Public Interest**

Today, cable companies provide high-speed Internet access service via cable modem without offering the transmission component of that service separately under tariff at cost-based rates. None of the commenters denies this, nor could they responsibly do so. The Commission should now confirm Verizon may do likewise in circumstances where it can, like those cable companies, offer video, high-speed Internet access, and voice service together over a single line to the customer's premises (albeit an optical fiber rather than a coaxial cable). Verizon is seeking nothing more than regulatory parity between FTTP broadband service and cable modem service on an interim basis until the pending broadband proceedings are completed. This request has received broad support from a variety of commenters.

Commenters correctly point out that "it would be irrational to impose disparate regulatory treatment on identical services which are offered in an identical manner, based solely on the identity of the service provider,"<sup>7</sup> and they urge the Commission to "recognize that broadband

---

<sup>7</sup> Corning Comments at 6; *see also* USIIA Comments at 6.

services are provided over competing platforms and regulatory discrimination between competing platforms will cause harm to the market and slow investment.”<sup>8</sup> They note that because the Commission has *already* granted the requested relief “to cable operators providing identical services, there is no technical or marketplace reason to deny such relief to Verizon,”<sup>9</sup> and that “[o]ne-sided regulation of incumbent LECs’ fiber-intensive broadband offering is especially unjustified given LECs’ second-place status in the broadband market.”<sup>10</sup> Moreover, “[s]uch relief will foster competition with the cable industry, which will create product and service innovation, reduced prices, more consumer choice, and MORE JOBS.”<sup>11</sup>

Commenters also recognize that “[r]egulatory burdens should be imposed only to counteract market power – and Verizon not only does not possess such power in the provision of broadband services, but it has no prospect of obtaining it given the lead of other providers and the multitude of independent competitive platforms.”<sup>12</sup> “Verizon’s incumbency for voice services provides it with no unfair advantages with respect to its cable or other competitors, and the Commission’s price cap regulation ensures that cross-subsidization is not a legitimate concern.”<sup>13</sup> Furthermore, “[r]emoving tariff regulations will give Verizon and each ISP the flexibility to negotiate the terms under which that ISP uses Verizon’s FTTP infrastructure to provide Internet access service to consumers.”<sup>14</sup> Significantly, however, the Commission “may

---

<sup>8</sup> Alcatel Comments at 3.

<sup>9</sup> Corning Comments at 7.

<sup>10</sup> SBC Comments at 6.

<sup>11</sup> National Black Chamber of Commerce (“NBCC”) Comments at 2.

<sup>12</sup> Corning Comments at 6.

<sup>13</sup> Ciena Comments at 5 (footnote omitted).

<sup>14</sup> Ad Hoc Telecom Manufacturer Coalition (“AHTMC”) Comments at 2.



grant *interim* relief without pre-deciding the broader issues presented in the prior [wireline broadband] proceedings.”<sup>15</sup>

Telecom equipment manufacturers unanimously agree that granting the requested relief could stimulate investment in FTTP technology, which not only would “benefit consumers by making available new and advanced telecom services and by helping increase competition in the multi-channel video programming and high-speed Internet access markets” but also would “benefit the U.S. economy as a whole.”<sup>16</sup> Corning predicts that if Verizon’s pioneering investment in FTTP succeeds, “it will create a new standard for broadband service in America, causing other providers to respond with their own investments in next-generation broadband technology,” and the result will be “a dramatic increase in the number and quality of broadband services available to U.S. consumers, the investment dollars flowing into the U.S. economy, and our ability to compete internationally in a variety of industries which utilize broadband services in the development or production of goods or services.”<sup>17</sup>

The commenters supporting the petitions note that “the statutory standard for mandatory forbearance is satisfied given the competitiveness of the broadband market and the public interest benefits flowing from the elimination of regulatory obstacles to broadband deployment.”<sup>18</sup> “[T]he incumbent LECs’ secondary position in this market – and the fact that cable modem providers already are providing service *without* onerous regulatory restrictions [–]

---

<sup>15</sup> SBC Comments at 10 (emphasis added).

<sup>16</sup> AHTMC Comments at 4; *see also* Alcatel Comments at 2; Ciena Comments at 5-4; Corning Comments at 2-5.

<sup>17</sup> Corning Comments at 2.

<sup>18</sup> *Id.* at 7; *see also* SBC Comments at 10-11; USIIA Comments at 7-8.

illustrate that regulation of wireline broadband services is not *necessary* to protect consumers or ensure proper operation of the market.”<sup>19</sup>

In sum, “[g]ranting interim relief to facilitate fiber investment as a way of promoting broadband competition, in light of the market-leading position enjoyed by cable modem providers, during the pendency of the Commission’s wireline broadband proceedings is now critical in ensuring the promotion of this Nation’s broadband policy.”<sup>20</sup>

## **II. The Petitions Seek Interim Relief Narrowly Tailored to Verizon’s New FTTP Broadband Services**

The relief sought in these petitions is limited in time and scope. The relief is limited in time because the relief sought here is to be effective only until the Commission completes its pending broadband proceedings. The Commission’s grant of interim relief would not prejudice the Commission’s ultimate conclusions in the ongoing broadband proceedings. But there is no basis for requiring common-carrier regulation for this brand new FTTP offering while the Commission considers the issue.

The relief is limited in scope because the petitions are designed to do nothing more than allow Verizon’s broadband services that will be provided over its new FTTP infrastructure to be sold in the same manner as the cable modem services that compete directly with them. None of Verizon’s other service offerings will be affected by this petition: not voice, not video, not even broadband service provided via means other than Verizon’s new FTTP network.<sup>21</sup>

---

<sup>19</sup> SBC Comments at 7.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> Some commenters claim that no interim regulatory relief is needed because Verizon has already demonstrated its willingness to roll out FTTP despite the regulatory uncertainty surrounding this service. *See* AT&T Opposition at 13-14; ALTS Comments at 4; Covad Opposition at 4-5; EarthLink Comments at 10-11. Although Verizon’s commitment to FTTP is

Although Verizon's petitions make clear that it wishes only for its FTTP broadband service to benefit from the regulatory decisions that enable cable companies to offer cable modem service on a private carriage basis without being subject to tariffs or cost justification, some commenters<sup>22</sup> claim that Verizon is seeking also to undermine the obligations set forth in the *Triennial Review Order*.<sup>23</sup> These claims are specious. Interim relief is sought only for FTTP broadband *services*, not obligations relating to the underlying FTTP *facilities*. Nothing in the present petitions is intended to change the facilities unbundling rules of the *Triennial Review Order* in any respect whatsoever. Lest there be any confusion on this point, when the petitions speak of "unbundling," they refer only to unbundling of services – namely, the unbundling of the transmission component of information services – *not* the unbundling of network elements,

---

real and substantial, each FTTP deployment must be justified in economic terms. It cannot be denied that the common-carrier rules at issue here impose costs on carriers and reduce the expected return on investments, and that these factors, in turn, impact the business case for any given FTTP deployment. As an empirical matter, "telecom companies often speed the pace of infrastructure purchases when regulations are eliminated." AHTMC Comments at 3. The Commission recognized this when it stated, in the *Cable Modem Declaratory Ruling*, that it was "mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4840, ¶ 73; *see also id.* at 4826, ¶ 47 (citing section 706 mandate to promote deployment of advanced telecommunications capability). Therefore, the regulatory environment for FTTP will necessarily have an impact on whether, when, and how quickly new deployments take place.

<sup>22</sup> Sprint Opposition at 4-7; AT&T Opposition at 16-17; Covad Opposition at 6-7, 11-12; EarthLink Comments at 4-5.

<sup>23</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

whether under section 251 or section 271.<sup>24</sup> Verizon has a separate forbearance petition pending regarding the scope of its unbundling obligations under section 271, and that proceeding, not this one, will determine Verizon's obligations to make network elements available under section 271.

Finally, for the record, nothing in the present petitions intended to affect the extent to which the Communications Assistance for Law Enforcement Act ("CALEA") applies to the FTTP broadband services at issue.<sup>25</sup>

### **III. The Commission Should Confirm that the Waivers and Determinations in the *Cable Modem Declaratory Ruling* Apply to FTTP Broadband Transmission**

In the *Cable Modem Declaratory Ruling*, the Commission has *already* determined that high speed Internet access offered by a company that also provides cable service regulated under Title VI of the Communications Act may be provided pursuant to individualized wholesale contracts with no obligation to file tariffs, and that this is equally true where that company also provides telecommunications services subject to Title II. These key determinations survived the

---

<sup>24</sup> Covad's assertion that "[w]hat the petitions seem to aim at (without overtly saying so) is the deregulation of even the limited TDM access the *Triennial Review Order* preserves for competitors to serve enterprise customers," is puzzling, since Covad's parenthetical phrase concedes that Verizon did not actually mention TDM or enterprise customers in the petitions at all. Covad Opposition at 6. There is no need for the "rigid" technical standards to define FTTP loops that Covad proposes (at 11-12) to solve the nonexistent problem of the petitions "blur[ring] the line between deregulated FTTP loops and hybrid fiber-copper loops." *Id.* at 11. The petitions do not address hybrid fiber-copper loops in any respect. Verizon seeks interim relief from rules that would prevent the new FTTP broadband services from being provided on individually negotiated terms and without being subject to tariffing at cost-based rates. Significantly, Covad does not affirmatively oppose this particular relief, whether through interim waiver or forbearance. *Id.* at 10 ("Covad does not, however, take any position as to whether Verizon has made the requisite showing to obtain . . . relief from the *Computer II/III* requirement to offer a separate basic transmission service on non-discriminatory, cost-based terms and conditions.") (citing Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) ("*Computer II*"); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*, 14 FCC Rcd 4289 (1999) ("*Computer III*").

<sup>25</sup> See generally United States Department of Justice Comments.

Ninth Circuit's decision that invalidated other aspects of the Commission's order; indeed, they were expressly left in place by the Ninth Circuit.

The Commission should declare that these key determinations also apply with equal force to FTTP broadband services because these services are offered under circumstances that parallel those at issue in the *Cable Modem Declaratory Ruling*. With the new FTTP infrastructure, Verizon will be able to provide video offerings that will directly compete with cable companies in their core video services.<sup>26</sup> FTTP also will enable Verizon to also offer high-speed Internet access and voice services on the same line, just as cable companies do today. Accordingly, where Verizon has deployed FTTP, it should be permitted to provide its broadband transmission over that new infrastructure pursuant to individually negotiated contracts with no obligation to file tariffs at cost-justified rates, just as cable companies do today. Granting this interim relief will promote competition with the incumbent cable operators in both video and broadband. The Commission and the courts have repeatedly recognized that tariffing and cost-justification requirements can be *harmful* when imposed in a competitive market, because they not only impose burdens on carriers that attempt to make new offerings but also reduce or eliminate both the incentive and ability to discount prices in response to competition and to make efficient price

---

<sup>26</sup> AT&T argues that the Commission should ignore the benefits of increased video competition delivered via FTTP because Verizon plans to deploy FTTP broadband before it deploys video services. AT&T Opposition at 14. But once Verizon's FTTP network is deployed, it plainly will be capable of offering video services together with broadband service over the same line. The fact that video will not be offered until local franchises are obtained and programming is finalized does not mean that the new network should not be regulated on the same basis as the corresponding cable networks. The regulatory status of FTTP broadband will impact video competition because it impacts FTTP deployment – and FTTP deployment is a prerequisite to Verizon's offering of competitive video services.

changes in response to changes in demand and cost.<sup>27</sup> Accordingly, while the ongoing rulemakings proceed, there is no reason for extending to FTTP broadband the tariffing, cost-justification, and common-carrier rules that were designed for services provided over the narrowband telephone network as it existed decades ago.

Unable to draw any meaningful distinction between cable modem service and Verizon's new FTTP broadband offering, some commenters who oppose Verizon's petitions resort to specious procedural arguments. Thus, AT&T and EarthLink argue that a declaratory ruling is not an appropriate vehicle to *repeal* any of the Commission's rules.<sup>28</sup> In this proceeding, however, Verizon does *not* seek to repeal any rules. Rather, it seeks a declaration that its FTTP broadband services benefit from the *waiver* of rules that the Commission *already* granted in its *Cable Modem Declaratory Ruling*.<sup>29</sup> Clarifying the scope of the existing waiver plainly is an appropriate subject for a declaratory ruling.

The New Jersey Ratepayer Advocate mistakenly labels Verizon's petitions as "premature" because Verizon has not yet obtained a local cable franchise.<sup>30</sup> This argument ignores that the very purpose of a declaratory ruling is to allow companies to obtain a ruling without having to risk violating any Commission rules. Verizon is planning to offer broadband Internet access via FTTP in a matter of weeks, and it has a right to know that it may do so with the benefit of the Commission's *Cable Modem Declaratory Ruling*. For the reasons given in its

---

<sup>27</sup> See Verizon Mem. at 13-14 (collecting authority).

<sup>28</sup> AT&T Opposition at 5; EarthLink Comments at 3-4.

<sup>29</sup> For this reason, EarthLink is wrong when it argues (at 4) that the Administrative Procedure Act requires public notice in the *Federal Register* before taking action. The present proceeding involves no rulemaking subject to 5 U.S.C. § 553.

<sup>30</sup> NJ Ratepayer Advocate Opposition at 3.

petitions and supporting memorandum, Verizon believes that no such tariff is or ought to be required. The matter is not free from doubt, however, because the Commission has not yet specifically addressed the appropriate regulatory treatment for broadband services in the context of the FTTP architecture. Verizon's petitions are, therefore, fully ripe and entirely appropriate.<sup>31</sup>

Finally, some commenters erroneously maintain that the Ninth Circuit's *Brand X* decision somehow limits the Commission's ability to grant the declaratory and other interim relief Verizon has requested.<sup>32</sup> Although the Ninth Circuit did reverse the Commission's ruling that cable modem service offered to end users is an information service and not a telecommunications service (although that aspect of the court's decision was stayed), it left the other aspects of the *Cable Modem Declaratory Ruling* untouched. *See Brand X*, 345 F.3d at 1132 n.14 ("[W]e decline here to consider their remaining claims (including those directed at the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis and its waiver of the *Computer II* requirements for cable companies who also offer local exchange service), leaving them for reconsideration by the FCC on remand.").<sup>33</sup> Earlier, in the *City of Portland* case,<sup>34</sup> upon which the Ninth Circuit based its *Brand X* decision, the Court expressly recognized that "the FCC has broad authority to forbear from enforcing the

---

<sup>31</sup> Declaratory rulings exist for "terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2.; cf. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1238, at 288 (2d ed. 1990) (noting that purpose of federal Declaratory Judgment Act is "to prevent avoidable damages from being incurred by a person who is not certain of his rights, and to afford [that party] an early adjudication of his rights . . . [before] damages have accrued").

<sup>32</sup> AT&T Opposition at 5-6; ALTS Comments at 6-7; EarthLink Comments at 13-14.

<sup>33</sup> In view of this clear statement by the Court that it "decline[d] here to consider" these claims, EarthLink's suggestion (at 15) that the Commission's waiver of the *Computer II/III* rules "must be understood to have been vacated along with the classification decision" is incomprehensible.

<sup>34</sup> *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. *See* 47 U.S.C. § 160(a).”<sup>35</sup> “Congress has reposed the details of telecommunications policy in the FCC,” the court explained, “and we will not impinge on its authority over these matters.”<sup>36</sup> In short, not only did the Ninth Circuit leave the determinations of the Commission that are at issue here intact, it specifically recognized the Commission’s ability to waive and forbear from any regulation, including those governing telecommunications services.<sup>37</sup>

#### **IV. Granting an Interim Waiver Is Appropriate and Consistent with Commission Precedent**

If for any reason the Commission should determine that it is unable to grant the declaration requested above, or that such a declaration would not be adequate to enable Verizon to offer broadband via FTTP on the same terms as its cable competitors, then the Commission should grant such waivers or forbearance as may be necessary to provide interim relief until an appropriate regulatory framework for broadband has been established.<sup>38</sup>

---

<sup>35</sup> *Id.* at 879; *see also Brand X*, 345 F.3d at 1138 (Thomas, J., concurring) (“Naturally, the FCC may choose to forbear from enforcing these [common-carrier] regulations if it determines they are not necessary to promote competition or protect consumers.”).

<sup>36</sup> *City of Portland*, 216 F.3d at 879-80.

<sup>37</sup> AT&T incorrectly asserts that “the straight-forward application of *Brand X* to Verizon’s FTTP service would be to require Verizon separately to tariff the physical transport of information between the end-user customer and the ISP over its fiber facilities and to make that transport available upon non-discriminatory, just and reasonable rates.” AT&T Opposition at 6. In fact, *Brand X* does not require that result even for the cable companies that were the subject of that lawsuit, as AT&T acknowledges. *Id.* at 11 (“[m]ost cable companies do not broadly make their facilities available to ISPs”).

<sup>38</sup> AT&T and EarthLink object that the Commission cannot simply “waive” statutory requirements (AT&T Opposition at 9; EarthLink Comments at 6-7), but Verizon has never asked the Commission to do so. Obviously, the Commission should waive only those rules that it has authority to waive, and it should use its forbearance authority to address any statutory requirements as needed.



First, the reasons behind the Commission's waiver of the *Computer II/III* rules for cable modem service apply with equal force to Verizon's FTTP broadband service. In the *Cable Modem Declaratory Ruling*, the Commission explained that "the core assumption underlying the *Computer Inquiries* was that the *telephone network* is the primary, if not exclusive, means through which information service providers can gain access to their customers."<sup>39</sup> The Commission found that information service providers have various means for gaining access to customers, and it waived on its own motion those requirements for cable modem service.<sup>40</sup> The record likewise reflects that Verizon's FTTP broadband service is neither the primary nor the exclusive means by which information service providers can gain access to customers, since cable modem and other intermodal competitors abound.<sup>41</sup> In addition, *other fiber overbuilders* are equally capable of deploying fiber to the premises, as the Commission has already concluded.<sup>42</sup> Hence, there is no need to require Verizon to offer the transmission component of

---

<sup>39</sup> *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 44 (internal quotation marks omitted); *see also* Alcatel Comments at 3 ("Legacy tariffing and nondiscrimination policies that were developed when telephone facilities were the exclusive access to consumer[s'] homes are inapplicable in the present marketplace where cable modem possesses a majority market share for wireline broadband access, and terrestrial and satellite broadband wireless products offer competitive pressure and alternatives for consumers.").

<sup>40</sup> *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825-26, ¶ 45.

<sup>41</sup> *See Broadband Competition: Recent Developments* at 1-8 & Tables 2 & 3 (Mar. 2004) ("*Broadband Competition Update*"), previously filed as an attachment to ex parte letter from Dee May, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 01-337, 01-338, 02-33, and 02-52 (FCC filed Mar. 26, 2004), also attached hereto as Exhibit A.

<sup>42</sup> *See Triennial Review Order*, 18 FCC Rcd at 17143, ¶ 275 (noting that "competitive LECs are currently leading the overall deployment of [FTTP] loops," which "demonstrates that carriers are not impaired" without unbundled access to FTTP loops); *see also id.* at 17141-42, ¶ 272, 17145, ¶ 278, 17150, ¶ 290 & n.837; *USTA II*, 359 F.3d at 584 ("An unbundling requirement under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [FTTP] and ILECs fearful that CLEC access would undermine the investments' potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market.").

its FTTP broadband services under tariff, at cost-based rates, while the broadband proceedings are pending.

Second, the Commission also has previously granted similar interim waivers of regulatory requirements pending the adoption of permanent rules for a given service.<sup>43</sup> As SBC points out, “[s]uch interim waivers are particularly warranted where, as here, the relief sought is consistent with previously established Commission policies.”<sup>44</sup> Because the Commission has already determined that a waiver is appropriate under parallel circumstances for a cable company, the corresponding interim waiver requested here would be fully consistent with existing Commission policies – and it also would allow FTTP broadband service to develop on a competitive basis while the Commission considers an appropriate regulatory framework for broadband in general.

There is no serious doubt that FTTP competes directly with cable modem service and that the two broadband offerings are substitutes for one another. As noted in Verizon’s Memorandum of Points and Authorities, the courts have made clear that the Commission has an obligation to administer waivers in a consistent, neutral, and fair manner.<sup>45</sup> The Commission should grant the interim waivers requested here, in fulfillment of this obligation, because the reasoning of the *Cable Modem Declaratory Ruling* applies with full force to Verizon’s FTTP

---

<sup>43</sup> Verizon Mem. at 13.

<sup>44</sup> SBC Comments at 10 & n.34 (citing Order Granting Petition for Rulemaking, Notice of Proposed Rulemaking, and Order Granting Interim Partial Waiver, *National Exchange Carrier Ass’n Petition to Amend Section 69.104 of the Commission’s Rules*, WC Docket No. 04-259, RM 10603, FCC 04-174, ¶¶ 34-35 (rel. July 19, 2004) (granting interim partial waiver where waiver was consistent with prior Commission ruling in analogous context).

<sup>45</sup> Verizon Mem. at 15 & n.31; *see also* USIIA Comments at 7.

broadband service and because the Commission has previously found it appropriate to grant interim relief pending consideration of new rules for a new service offering.

**V. Alternatively, the Requirements for Forbearance Pending Completion of the Ongoing Rulemakings Are Satisfied**

To the extent that the Commission finds any statutory or other impediment to granting the requested declaration or waiver – that Verizon’s FTTP broadband service may be offered on an individually negotiated basis without being subject to tariffs or cost justifications – it can and should forbear from enforcing that requirement.<sup>46</sup>

**A. The Commission Has Already Tentatively Concluded that the Conditions for Forbearance Exist**

As set forth in Verizon’s Memorandum, the Commission has not merely the power, but the duty, under section 10 of the Communications Act to “forbear from applying any regulation or any provision of this Act” to any “telecommunications carrier” if it determines that: (1) enforcement “is not necessary to ensure that the charges, practices, classifications, or regulations” by that carrier for a telecommunications service “are just and reasonable and are not unjustly or unreasonably discriminatory”; (2) enforcement is not “necessary for the protection of consumers”; and (3) forbearance would be “consistent with the public interest.” 47 U.S.C. § 160(a).<sup>47</sup>

---

<sup>46</sup> AT&T’s argument (at 16-17) that forbearance from obligations under sections 251 and 271 is not possible because the requirements of those sections have not yet been fully implemented, as required by section 10(d), is not only incorrect but *irrelevant to this proceeding* because Verizon is not seeking any alteration of its section 251 or 271 obligations here.

<sup>47</sup> EarthLink asserts (at 8-9), without citing any precedent, that a geographic market analysis is necessary in a petition for forbearance. No such requirement exists, either in Commission precedent or in section 10 of the Communications Act, which plainly empowers the Commission to grant forbearance “in *any* or some” geographic markets. 47 U.S.C. § 160(a). Although section 10 gives the Commission the flexibility to limit forbearance to a particular geographic market when it is appropriate to do so, it does not expressly or by implication require

The Commission has already tentatively concluded that forbearance from Title II regulation of cable modem service would satisfy the requirements for forbearance under section 10 “because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.”<sup>48</sup> The developing state of the market, the availability of competing facilities, and the negative impact on investment incentives that application of common-carrier regulations would entail all support interim regulatory relief for FTTP broadband service just as they did for cable modem service.<sup>49</sup> Indeed, the case here is stronger because local telephone companies serve a smaller share of the broadband market than cable companies, and deployment of FTTP, in particular, is just beginning.<sup>50</sup>

**B. No Market Power or Other Justification Exists for Common-Carrier Regulation of FTTP Broadband Service**

The case law and Commission precedent make it clear that a party can become subject to common-carrier regulation in two ways: *First*, the party can take on a “quasi-public character”

---

a geographic market analysis to accompany every forbearance petition. To the extent that any forbearance is needed in order to provide the interim regulatory relief Verizon has requested, Verizon seeks nationwide forbearance, just as the Commission has *already* proposed to grant to cable modem service. Satellite broadband, by its very nature, offers ubiquitous coverage, and cable modem service is already available to approximately 85-90% of U.S. households, *see, e.g.*, National Cable & Telecommunications Association, *2004 Mid-Year Industry Overview* at 1 (2004) (“advanced services now available to more than 95 million U.S. households” via cable). The Commission has itself suggested that the appropriate scope for analysis is national when consumers in different localities face similar choices. *See, e.g.*, Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22759-60, ¶ 27 & n.64 (2001).

<sup>48</sup> *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

<sup>49</sup> Verizon Mem. at 19; SBC Comments at 10.

<sup>50</sup> Verizon Mem. at 19.

by holding itself out to serve the public indifferently.<sup>51</sup> *Second*, the company can be required to operate as a common carrier in order to prevent the abuse of monopoly power that it possesses.<sup>52</sup> With regard to the first ground for common-carrier regulation (quasi-public character), Verizon has made it clear that it wishes to negotiate individual terms and conditions with its FTTP broadband transmission customers (just as cable modem providers do) rather than undertaking to serve all of them indifferently.<sup>53</sup> It is by now settled law that the mere fact that Verizon would be *permitted* to hold itself out to the public indiscriminately if it so desired is “not sufficient basis for imposing the burdens that go with common carrier status.”<sup>54</sup>

With regard to the second ground for common-carrier regulation (market power), the Commission repeatedly has found that the broadband market is developing on a competitive basis and that the preconditions for monopoly are absent.<sup>55</sup> This is all the more true for FTTP,

---

<sup>51</sup> *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976) (“*NARUC I*”).

<sup>52</sup> ALTS gets the policy imperative precisely backwards when it argues (at 9) that “the Commission should not make any decision here to eliminate regulation on a temporary basis while it is still in the midst of determining if that regulation is necessary and appropriate on a permanent basis.” Until there is some basis in the record for supposing that a new service like FTTP broadband in a rapidly changing market *must* be subjected to common-carrier regulation in order to protect competition, the presumption should be that private carriage is permissible, absent any undertaking by the service provider to offer service to the public indiscriminately.

<sup>53</sup> On a related note, AT&T (at 8) and ALTS (at 8) assert that the historically disparate regulatory treatment of telephone companies might provide a basis for imposing common-carrier regulation on FTTP because, unlike cable networks, telephone networks have traditionally been operated on a common-carrier basis. But even assuming, *arguendo*, that this is true with respect to Verizon’s legacy networks, it does not provide a basis for imposing common-carrier treatment for services provided via the newly constructed next-generation FTTP network, when cable modem services offered in parallel circumstances are permitted to operate as private carriers.

<sup>54</sup> *NARUC I*, 525 F.2d at 644.

<sup>55</sup> *See, e.g., United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (“*USTA I*”) (“The Commission’s own findings (in a series of reports under § 706 of the 1996 Act) repeatedly confirm both the robust competition, and the dominance of cable, in the

since the Commission found that incumbent telephone companies have no particular advantage over their competitors in the deployment of these next-generation facilities.<sup>56</sup>

The Commission considered “the state of intermodal competition for broadband service” in its *Triennial Review Order* and concluded that “broadband services . . . are currently provided in a competitive environment.”<sup>57</sup> Verizon has repeatedly demonstrated in various proceedings that the market is developing on a competitive basis<sup>58</sup> – and the *Broadband Competition Update*

---

broadband market.”); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) (“*First Advanced Services Report*”) (“The preconditions for monopoly appear absent. . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio.”); Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 17 FCC Rcd 2844, 2877-81, ¶¶ 79-88 (2002) (describing development of intermodal competition in broadband market); Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22747-48, ¶ 5 (2001) (“[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services.”); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules To Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864, ¶ 17, 11865, ¶ 19 (2000) (noting with approval “a continuing increase in consumer broadband choices within and among the various delivery technologies,” which indicates that “no group of firms or technology will likely be able to dominate the provision of broadband services”); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9866-67, ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face “significant actual and potential competition from . . . alternative broadband providers”).

<sup>56</sup> *Triennial Review Order*, 18 FCC Rcd at 17142-44, ¶¶ 273-275.

<sup>57</sup> *Id.* at 17151-52, ¶ 292.

<sup>58</sup> See Comments of Verizon at 8-19, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, WC Docket No. 01-337 (FCC filed Mar. 1, 2002); Comments of Verizon on the Fourth Notice of Inquiry at 8-14, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of*

attached as Exhibit A hereto provides recent evidence confirming that fact. And even AT&T correctly said in other Commission proceedings that “Title II regulation is not necessary to ensure just and reasonable charges or to protect consumers. Moreover, inflexible government intervention would only undermine the pro-competitive commercial experimentation that will ensure optimal solutions to the many technical and operational issues raised by multiple ISP access.”<sup>59</sup>

Recent developments in the marketplace confirm the Commission’s repeated findings that broadband is developing competitively. Since the Commission eliminated unbundling requirements for broadband in its *Triennial Review Order*, for example, prices have steadily decreased while output (*i.e.*, subscribership) has steadily increased.<sup>60</sup> As Verizon demonstrated, the Bell companies have cut their national DSL prices considerably, which has prompted cable companies to begin offering promotional and targeted price reductions and to increase the data speeds of their service offerings, effectively offering consumers more bandwidth at a lower price

---

*the Telecommunications Act of 1996*, GN Docket No. 04-54 (FCC filed May 10, 2004) (“Verizon 706 Comments”); Ex parte letter from Dee May, Verizon, to Marlene Dortch, FCC, WC Docket Nos. 01-337, 02-33, 98-10 & 95-20 (Nov. 13, 2003) (“Verizon Nov. 13 Ex Parte”); *see also, e.g.*, Corning Comments at 6 (“Verizon not only does not possess [market] power in the provision of broadband services, but it has no prospect of obtaining it given the lead of other providers and the multitude of independent competitive platforms.”).

<sup>59</sup> Comments of AT&T Corp. at 53, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, CS Docket No. 02-52 (FCC filed June 17, 2002).

<sup>60</sup> *See, e.g.*, Ciena Comments at 2-3 (“[T]he marketplace has responded affirmatively to the reduction in uncertainty as a result of the release of the *Triennial Review Order*, as well as that decision’s removal of some of the broadband investment disincentives as a result of the reduction in fiber and packet switching unbundling.”).

than those operators' previous offerings.<sup>61</sup> These price reductions have led to rapid subscriber growth.<sup>62</sup>

Moreover, other broadband technologies and services also continue to develop, such as 3G mobile wireless, fixed wireless, broadband-over-power-lines, and satellite. As Verizon demonstrated in considerable detail, recent evidence confirms that the availability and use of these technologies is steadily increasing.<sup>63</sup> AT&T's only response is to focus on the current number of subscribers for these technologies,<sup>64</sup> even though AT&T has acknowledged in other contexts that the proper focus should be on "'availability' of competitive alternatives."<sup>65</sup> This is particularly true for a nascent market like broadband, where even the more established technologies, like cable and DSL, still maintain only a small percentage (less than one quarter) of the total potential customer base. "[E]xplosive growth of the kind that the broadband transport

---

<sup>61</sup> *Broadband Competition Update* at 7, Table 4; see also, e.g., Brigitte Greenberg, *Cable Companies Use Speed To Gain Competitive Edge over DSL*, Communications Daily, July 28, 2004, at 2 ("Comcast and Time Warner Cable announced they were offering customers higher-speed tiers for cable modem service, signaling what cable executives have long said – they would compete against DSL on speed and portal content.").

<sup>62</sup> See, e.g., Jeffrey Halpern *et al.*, Bernstein, *Broadband Update* 4 (Mar. 10, 2004) ("DSL's market share gain of gross additions . . . reflects its lower pricing as introduced in May 2003, coupled with a narrowing of cable's historical availability advantage."); M. McCormack *et al.*, Bear Stearns, *Encouraging Wireline Results Highlight Strong Quarter* 6 (Apr. 21, 2004) ("DSL growth was driven by [SBC's] expanded broadband footprint . . . , increased use of retail and Internet sales channels, a tiered offering, and special packages aimed at business customers.").

<sup>63</sup> *Broadband Competition Update* at 13-24.

<sup>64</sup> AT&T Opposition at 13.

<sup>65</sup> Comments of AT&T Corp. at 2, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 02-145 (FCC filed July 29, 2002).



industry is currently undergoing can render the network externalities largely irrelevant,” and allow entrants to gain market share rapidly.<sup>66</sup>

Furthermore, the interim relief being sought in the present petitions applies *only* to broadband delivered via FTTP. Hence, even if AT&T were correct in asserting that “a significant percentage of households in the United States can only obtain DSL,” or that DSL operators “dominate” the small business broadband market<sup>67</sup> (and these assertions are *not* correct, as Verizon has repeatedly shown<sup>68</sup>), those facts would not be germane to the present petitions. Neither AT&T nor any other commenter alleges that a significant percentage of households in the United States can obtain only FTTP, or that FTTP dominates the small business broadband market – nor could anyone responsibly so allege.

### **C. The Requested Interim Relief Cannot Harm Competition**

Finally, it would be arbitrary and capricious to regulate the second-place, telephone company broadband providers more than the dominant cable companies.<sup>69</sup> Certainly, the Commission cannot accept the perverse argument of AT&T and EarthLink that Verizon must open its new FTTP broadband lines to others on a common-carrier basis precisely *because* the

---

<sup>66</sup> Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. on Reg. 171, 279 (2002).

<sup>67</sup> AT&T Opposition at 12-13. ALTS (at 7) likewise argues, erroneously, that “[c]able primarily serves residential customers, and wireline serves small and large businesses.” In fact, cable companies have been aggressively targeting small businesses. See Verizon Nov. 13 Ex Parte at 10-17; *Broadband Competition Update* at 3-6 & Table 3.

<sup>68</sup> *Broadband Competition Update* at 1-8; see also Verizon 706 Comments at 22-23.

<sup>69</sup> See *USTA I*, 290 F.3d at 428-29 (Commission’s regulation of DSL without considering cable modem service in its analysis was “quite unreasonable”); see also Ciena Comments at 4 (“[T]here is no rational basis for applying burdensome regulations on the broadband services provided by Verizon when the Commission has already determined not to apply these obligations on cable carriers, which presently have the majority of multi-channel video and high-speed data customers.”).

cable companies that dominate the broadband mass market will not have to do so.<sup>70</sup> This argument gets things exactly *backwards*: Various provisions of federal law, principles of orderly administrative process, sound economic policy, and simple fairness all dictate that similar services be regulated in a similar fashion.<sup>71</sup>

Contrary to the claims of some, the fact that cable modem providers sometimes limit access to their broadband transmission services does *not* indicate that telephone companies have any kind of market power with regard to these services (especially insofar as FTTP is concerned, since so few premises are affected).<sup>72</sup> As Verizon has explained in some detail in the pending broadband proceedings, 60 years of court and Commission precedent teach that the Commission must define the broadband mass market to include all current and likely future providers of broadband services, without regard to whether such providers are offering service only on an integrated basis (as some cable modem operators do) or are providing services on a wholesale basis to ISPs and other information services providers as well.<sup>73</sup> This is because, as explained in a leading treatise on antitrust law, as a matter of economics, “a defendant dominating industry output – or hoping to do so – cannot raise prices to monopoly levels by reducing output when its rivals have a large volume of efficient excess capacity that can quickly generate additional and readily saleable output.” 2A Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 535c, at 221 (2002).

---

<sup>70</sup> AT&T Opposition at 8; EarthLink Comments at 11-12.

<sup>71</sup> See, e.g., Comments of Verizon at 23-30, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket Nos. 02-33, 95-20 & 98-10 (FCC filed May 3, 2002) (discussing requirements for equal treatment of similarly situated services under section 706 of the Telecommunications Act of 1996, the Administrative Procedure Act, the Due Process Clause, and the First Amendment).

<sup>72</sup> AT&T Opposition at 11; ALTS Comments at 4-5.

<sup>73</sup> Verizon Nov. 13 Ex Parte at 1-7.

Although the cable modem operators that are the dominant providers of mass-market broadband services operate primarily on a vertically integrated basis, they nonetheless have the ability to use their capacity to provide services at wholesale, and this ability constrains the behavior of competing broadband providers that do provide wholesale service (whether via FTTP or otherwise).

In any event, there is no basis for the claims of some commenters that, if the requested interim relief is granted, Verizon will decline to sell FTTP broadband transmission to unaffiliated ISPs. Verizon has already reached an agreement with the United States Internet Industry Association – an organization representing nearly 300 Internet providers – that it will negotiate commercial agreements with ISPs in a deregulated broadband market. That agreement is attached hereto as Exhibit B. Verizon’s interest in providing broadband transmission to ISPs is based on sound business principles: Verizon will incur huge costs in deploying FTTP (and otherwise upgrading its network to provide broadband), and the more traffic there is on the network, the easier it is to recover those costs – provided that Verizon is permitted to negotiate commercially reasonable, market-based rates with others who use the network.<sup>74</sup> The decisions

---

<sup>74</sup> AT&T’s suggestion (at 11) that Verizon might refuse to deal with ISPs because they “would have a strong incentive to use the wholesale access they gain to offer VoIP service that would compete with [Verizon’s] traditional local telephone services” makes no sense. VoIP providers such as Vonage, Skype, and AT&T itself are already operating successfully over broadband infrastructure provided by cable companies and telephone companies alike. Keeping unaffiliated ISPs off Verizon’s network would do nothing to slow the growth in VoIP traffic, since VoIP providers could sell their services over Verizon’s network in any event. Furthermore, Verizon itself recently made a nationwide launch of its own VoiceWing VoIP broadband phone service, which permits customers to choose a phone number from an extensive list of area codes in 139 markets in 33 states and the District of Columbia. VoiceWing subscribers can make calls over any broadband Internet connection and manage their calls from any computer with Internet access – regardless of where it is located. The service also provides a variety of advanced call-management features such as enhanced call-forwarding and call logs that itemize all calling activity. Thus, far from attempting to curtail VoIP growth, Verizon has actively embraced VoIP.

of various cable companies to open their networks to unaffiliated ISPs on a private-carriage basis provides further evidence of the potential value of this business model. Indeed, EarthLink's complaint about the need for common-carrier rules rings especially hollow because it *already* has contracts with Charter, Comcast, Time Warner, BellSouth, SBC, and Sprint.<sup>75</sup> Earthlink has also reached a commercial agreement with Verizon for services that go beyond what Verizon is required to provide under the current rules.<sup>76</sup> Consequently, the facts fail to support the suggestion that the requested interim relief would in any way harm competition or prevent ISPs from reaching their customers.

\* \* \* \* \*

To sum up, imposing burdensome tariffing, cost-justification, and common-carrier requirements would serve no legitimate purpose in the context of Verizon's FTTP broadband service; the Commission should refrain from imposing those requirements, as it has already done with cable modem service. The Commission has repeatedly recognized that tariffing and cost-justification requirements affirmatively harm competition if they are imposed in a competitive environment. As SBC correctly observes, "[b]y providing such interim relief, the Commission would further its stated objectives of encouraging broadband deployment and eliminating irrational regulatory disparities, without prejudging the broader deregulatory proposals that sit before it."<sup>77</sup>

---

<sup>75</sup> See EarthLink, Inc., Form 10-Q, at 18 (SEC filed Aug. 14, 2003); EarthLink Press Release, *EarthLink Widens Nationwide High-Speed Access Footprint* (July 17, 2003).

<sup>76</sup> Earthlink Press Release, *Earthlink and Verizon Sign New Agreement To Broaden High-Speed Internet Footprint* (Feb. 10, 2004).

<sup>77</sup> SBC Comments at 3.

**Conclusion**

The Commission should grant the relief requested in Verizon's petitions.

Respectfully submitted,

THE VERIZON TELEPHONE COMPANIES

By:

Michael E. Glover  
VERIZON  
151 North Court House Road  
Suite 500  
Arlington, VA 22201-2909  
*Of Counsel*

/s/ J.C. Rozendaal  
J.C. Rozendaal  
KELLOGG, HUBER, HANSEN, TODD  
& EVANS, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036-3209  
(202) 326-7900

Edward Shakin  
Julie Chen Clocker  
VERIZON  
1515 North Court House Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3071

August 2, 2004

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served by first-class mail this 2nd day of August 2004, upon the following:

/s/ Carol Inniss  
Carol Inniss

*Peter Radizeski*  
16545 Lake Brigadoon Circle  
Tampa, FL 33618

Michael D. Bathrick  
President  
*BerkshireNet, Inc.*  
126 Fenn Street  
Pittsfield, MA 01201

Christopher J. White, Esq.  
Deputy Ratepayer Advocate  
*New Jersey Division of the Ratepayer Advocate*  
31 Clinton Street, 11<sup>th</sup> Floor  
P.O. Box 46005  
Newark, NJ 07101

David P. McClure  
President & CEO  
*US Internet Industry Association*  
5810 Kingstowne Center Drive  
Kingstowne, VA 22315

Harry C. Alford  
*National Black Chamber of Commerce*  
1350 Connecticut Avenue, NW  
Suite 405  
Washington, DC 20036

David Lawson  
C. Frederick Beckner III  
Sidley Austin Brown & Wood LLP  
(for AT&T)  
1501 K Street, NW  
Washington, DC 20005

H. Richard Juhnke  
John Benedict  
*Sprint Corporation*  
401 9<sup>th</sup> Street, NW, #400  
Washington, DC 20004

Laura H. Parsky  
Patrick W. Kelley  
Robert C. Gleason  
*U.S. Department of Justice*  
950 Pennsylvania Avenue, NW  
Room 2113  
Washington, DC 20530

Timothy J. Regan  
*Corning Incorporated*  
1350 I Street, NW, Suite 500  
Washington, DC 20005-3305

James Kirkland  
Susan J. Davis  
Praveen Goyal  
*Covad Communications*  
600 14<sup>th</sup> Street, NW, Suite 750  
Washington, DC 20005

William T. Lake  
William R. Richardson, Jr.  
Lynn R. Charytan  
Kathryn Reilly  
Wilmer Cutler Pickering Hale and  
Dorr LLP  
(for SBC Communications)  
2445 M Street, NW  
Washington, DC 20037-1420

John W. Butler  
David N. Baker  
Earl W. Comstock  
*EarthLink, Inc.*  
1850 M Street, NW, Suite 900  
Washington, DC 20036

Stephen L. Goodman  
Wilkinson Barker Knauer, LLP  
*(for CIENA Corporation)*  
2300 N Street, NW, Suite 700  
Washington, DC 20037

Paul Kenefick  
*Alcatel North America*  
1909 K Street, NW, Suite 800  
Washington, DC 20006

Jason D. Oxman  
Teresa K. Gaugler  
*Association for Local  
Telecommunications Services*  
888 17<sup>th</sup> Street, NW, Suite 1200  
Washington, DC 20006

Rodney L. Joyce  
Joyce & Associates  
*(for Ad Hoc Telecom Manufacturers)*  
10 Laurel Parkway  
Chevy Chase, MD 20815

Manuel Mirabal  
*National Puerto Rican Coalition, Inc.*  
1901 L Street, NW, Suite 802  
Washington, DC 20036

Rodney L. Joyce  
Joyce & Associates  
*(for Pirelli Communications and  
Fiber Optic Network Solutions)*  
10 Laurel Parkway  
Chevy Chase, MD 20815